JD(SF)-39-09
Henderson, Nevada

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE M RESORT, LLC d/b/a
M RESORT SPA CASINO

and Cases 28-CA-22299
28-CA-22370

BRUCE ALLEN, an Individual

and Case 28-CA-22309

RUSSELL L. SHOCK, JR., an Individual

and Case 28-CA-22310

MICHAEL DeVITO, an Individual

and Case 28-CA-22319

ROMAN MEDINA, an Individual

Joel C. Schochet, Atty., of Las Vegas,
Nevada, Region 28, Counsel for the General Counsel
Shaun P. Haley and Mark J. Ricciardi, Attys., Fisher & Phillips, LLP
Las Vegas, Nevada, Counsel for Respondent

DECISION

I. Statement of the Case

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by Bruce Allen (Mr. Allen), an Individual, in Cases 28-CA-22299 and 28-CA-22370, Russell L. Shock, Jr. (Mr. Shock), an Individual, in Case 28-CA-22309, Michael DeVito (Mr. DeVito), an Individual, in Case 28-CA-22310 and Roman Medina (Mr. Medina), an Individual, in Case 28-CA-22319, the Regional Director of Region 28 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing (the complaint) on March 31, 2009. The complaint alleges that The M Resort LLC d/b/a M Resort Spa Casino (Respondent) violated Sections 8(a)(1) of the National Labor Relations Act (the Act). This matter was tried in Las Vegas, Nevada on May 27-29, and July 8, 2009.

II. Issues

1. Did Respondent violate Section 8(a)(1) of the Act by any of the following conduct: by unlawfully applying the terms of the "Team Members" statement in its employee handbook to limit and restrict the rights of employees to engage in union and other concerted activity; by displaying a "no union" symbol at an employee orientation session and thereby threatening employees with

unspecified reprisals if they supported a union and informing employees that it would be futile for them to select a union as their bargaining representative; by threatening employees with unspecified reprisals if they engaged in union activities; by orally promulgating an overly-broad and discriminatory rule prohibiting employees from engaging in union activities; by orally promulgating an overly-broad and discriminatory rule prohibiting employees from engaging in concerted activities; by threatening employees with discharge if they violated an overly-broad and discriminatory rule prohibiting employees from engaging in union activities; by requiring employee security guards, to engage in the surveillance of the union activities of other employees and to report to management the results of such surveillance; by threatening employees with discharge if they engaged in concerted activities, including complaining about their working conditions; by threatening employees with discharge if they engaged in union activities; by interrogating employees about their concerted activities and the concerted activities of other employees?

2. Did Respondent violate Section 8(a)(1) of the Act by discharging Mr. Allen and Dean Skibickyj on December 13, 2008?
3. Did Respondent violate Section 8(a)(1) of the Act by discharging Mr. DeVito, Mr. Medina, Mr. Shock, and Joseph Varner on December 13, 2008?

III. Jurisdiction

At all relevant times, the Respondent, a Nevada limited liability company, with an office and place of business in Henderson, Nevada, herein called the Respondent's facility, was engaged in the business of constructing and operating a casino, hotel, and restaurants. Based on a projection of its operations since on or about March 1, 2009, the Respondent will annually derive gross revenues in excess of $500,000. Based on the same projection of its operations, the Respondent will annually purchase and receive at the Respondent's facility goods valued in excess of $50,000 directly from points outside of the State of Nevada. I find the Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

IV. Findings of Fact

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact for the period relevant to the complaint allegations. Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

A. The Respondent's Relevant Business Operations, Policies, and Procedures

In 2008[1] the Respondent commenced construction of the Respondent's facility. Prior to July, the Respondent utilized contract security services. After July 30, the Respondent employed a construction security staff (security officers or security staff), the first group of which was hired on July 30 and included Mr. Allen and Mr. Skibickyj who thereafter worked on the day

[1] All dates herein are 2008 unless otherwise specified.

shift. In October, the Respondent hired Mr. DeVito, Mr. Medina, and Mr. Shock. The three October hires worked on the graveyard shift as did Mr. Joseph Varner (Mr. Varner) [2] although Mr. Medina later moved to the day shift.

Commencing the end of July, the Respondent held periodic employee orientations (orientation(s)) for newly hired groups of security officers at the Tririga Building of the Marnell Company, the Respondent's parent company. Each orientation was succeeded by a training academy conducted by the Respondent's security managers, the purpose of which was to train new officers on relevant state laws and the Respondent's procedures and policies (collectively the orientations and academies are referred to herein as orientation/academy meetings). Three orientation/academy meetings are relevant to the complaint: one held at the end of July (the July orientation/academy), one held on October 2 (the October orientation/academy), and one held on December 10 (the December orientation/academy).[3]

During the 2008 construction period, the Respondent had no physical facilities designated for the security staff. The Respondent's Human Resource and Career Center offices were located in temporary trailers (the HR trailers), which also housed restrooms for the use of the security staff. Personnel and other employment files were kept in locked file cabinets in the HR trailers.[4]

The Respondent's supervisory hierarchy relevant to the security staff during the relevant period included:

William Houtchens (Mr. Houtchens)	-	Vice President of Security and Surveillance
Maria Tamayo-Soto (Ms. Soto)	-	Director of Security
Anthony Perez (Mr. Perez)	-	Security Department Investigator
Doug McCombs (Mr. McCombs)	-	Director of Human Resources
Laura Martinez (Ms. Martinez)	-	Employee Relations Manager
Gerry Newell (Mr. Newell)	-	Training Coordinator

During the relevant period, Respondent maintained the following language in its employee handbook (the Respondent's union-position provisions):

> Our policy on communications is simple, we want to hear from all Team Members and we plan to keep you informed and up-to-date as we move through the early stages of our resort.
>
> We want M Resort to stand out as something special and that attitude and work ethic of Team Members in all departments and all levels will ensure that our team will be seen as something special by our Guests, and seen by our Team

[2] Mr. Varner did not testify, and no evidence was adduced as to when he was hired.

[3] The General Counsel has alleged that supervisors and/or agents of the Respondent made certain statements at the July, October, and December orientation/academy meetings that violate Section 8(a)(1) of the Act. It is not clear whether alleged statements recounted hereinafter were made at orientations or at succeeding training academies. Since identifying the event at which the statement was allegedly made is not material to the complaint allegations, specific distinctions between orientation and academy statements have not been made.

[4] One group of files consisted of Applicant Tracking Forms that tracked the progress of every employment applicant.

Members as a place where you can expect consistent, fair and uniform treatment.

The best way to ensure our Team has a great working relationship and job security as a thriving organization is to work and communicate directly with each other and depend on each other. That is why we have taken the position that we are not interested in having unions here at M Resort. We do not believe that having an outside party like a union at M Resort would help us with our day-to-day communication, our trust in one another or help us reach our goal of ensuring an enjoyable experience for Guests and fellow Team Members.

At some point, many of us have worked at properties that do have unions. We have seen the "us vs. them" atmosphere that is often the result. We have heard from many of our Team Members who preferred not to be a part of any union, but felt pressured to join and pay dues. We have heard from our Team Members that there is a strong sentiment that having unions at this property is not needed or desired.

If at some point, a union does attempt to get in at M Resort, we will commit to do whatever we have to do legally and ethically to educate all Team Members about the union and the reasons why we are better off operating as a union-free team.

We certainly look forward to working with you as our Team Member and encourage your comments and questions.

The Respondent's Security Department Training Manual, a copy of which was provided to each security employee, contained a Code of Ethics to which security officers were expected to pledge and which included, in pertinent part, the following provisions:

2. To conduct myself with honesty and to adhere to the highest moral principals in the performance of my security duties.
4. To observe the precepts of truth, accuracy and discretion without allowing personal feelings, prejudices and animosities or friendship to influence my judgments.
5. To report to my supervisors without hesitation any violation of the law or of my employer or client's regulations.
9. To conduct myself professionally at all times and to perform my duties in a manner that reflects credit upon myself, my employer and the security profession.

B. Alleged Unlawful Statements: the 2008 Orientation/Academy Meetings

At the end of July/first of August, the first group of fifteen security officers hired by the Respondent attended the July orientation. During that orientation, Mr. Newell gave a new-employee PowerPoint presentation that included a slide entitled "Team Member Relations." The slide bore a graphic of the words "NO UNION" broadly encircled in black with a thick "X" drawn through them (the No Union slide).[5] The accompanying slide text read:

Treat every Team Member with dignity and fairness
Encourage Team Members to speak for themselves

[5] The Respondent introduced a 93-page hard copy of the PowerPoint presentation showing the content of each slide along with the slide script.

Outside party is not necessary
We believe it is not in your best interest to sign union cards
It's your choice

According to Mr. Newell, in presenting the No Union slide with its accompanying text to the employees, he read the following script verbatim:

The M Resort is committed to treat every Team Member with dignity and fairness.
We encourage all Team Members to speak for themselves on matters of employment.
We do not feel that intervention by an outside party like the union is necessary.
It's your choice. Under Federal Labor Law, you have the right to join or not to join a union. [Emphasis as written].
The choice to be represented by a union is up to each Team Member.[6]

During the July orientation/academy, various managers, including Mr. McCombs and Mr. Houtchens, introduced themselves to the incoming employees and spoke briefly. According to Mr. Allen, Mr. Houtchens said there was to be no talk of unions on the jobsite, that the Respondent was a non-union place, and that the company would not tolerate any discussion of unions or union paraphernalia like flyers. He warned that employees who defied the restrictions would not have a job. Mr. Skibickyj testified that Mr. McCombs said the company did not believe in union activity on the job and did not condone it, and told employees that if they knew of any union activity or were exposed to it, they were to report it to management. Both Mr. Houtchens and Mr. McCombs denied making any such statements. Employee witnesses Michael Murray (Mr. Murray), Ora Ann Larose (Ms. Larose), and John Kring (Mr. Kring) testified about the July orientation/academy. Mr. Murray's testimony was characterized by a striking inability to recall, and I give no weight to his testimony. Ms. Larose's testimony consisted of a series of denials that specific statements were made, and I give it little weight.[7] Mr. Kring also denied that management speakers at the July orientation/academy made the statements recalled by Mr. Allen and Mr. Skibickyj. His testimony went beyond denials; he testified that Mr. Newell and Mr. McCombs said the company was nonunion, explaining that the Respondent hoped for open communications between employees and management and questioning why employees should pay good money to a third party to represent them. Based on manner and demeanor and relative clarity of recall, I found Mr. Kring to be a reliable witness, and I accept his testimony.

On October 2, Mr. Newell conducted the October orientation with the same PowerPoint presentation that had been shown in the July orientation, including the No Union slide. Mr. Newell followed the slide script verbatim. Soon after October 2, Mr. Houtchens and Ms. Soto conducted a training academy at which Mr. Houtchens was present. According to Mr. Medina, Ms. Soto told the academy attendees that Respondent did not deal with unions, and Mr. Houtchens said the Respondent did not deal with unions because the Marnells (Respondent's owners) did not like it. Mr. Medina testified that "they" said employees were to report union activity to either Ms. Soto or Mr. Houtchens. Ms. Soto and Mr. Houtchens denied making any such statements. Helen Lindsey-Ginden (Ms. Ginden) testified that Mr. Newell said the Respondent was a non-union house, that the owners wanted it to continue that way, but that employees had a free choice to change it. Ms. Ginden denied that Ms. Soto said the

[6] Mr. Newell's testimony was clear, direct, consistent, and apparently sincere. I credit his testimony of his participation in the Orientation/Academy meetings.

[7] I recognize it is difficult to prove a negative and that counsel must often ask witnesses if specific statements were made, eliciting yes or no answers, but Ms. Larose's series of denials without exploration of what statements about the Union, if any, she recalled were unpersuasive.

Respondent did not deal with unions and recalled that Mr. Houtchens explained that security officers had a duty to notify the company of the presence and activities of people who weren't supposed to be on the property.[8]

On December 10, Mr. Newell conducted a third new-employee orientation (the December orientation), again giving a PowerPoint presentation. Unlike the previous July and October orientations that had included the No Union slide, in the December orientation Mr. Newell showed a video regarding unionization entitled "Working Together." Mr. Newell read verbatim the following script in introducing the video: "Our Leadership Team is committed to working together directly with you. We believe we can communicate directly with each other to meet our needs, and work together as a team, and [we] don't need a third party like a union to intervene or come between us and our [team members]. Are unions necessary? Let's see…"[9] According to Mr. Shock, at the academy meeting Mr. Houtchens told new employees, "There [will] be no talk of the union. If there [is] you can see yourself out of the door." Mr. Houtchens denied making any such statement. Employee Patrick Cottingham, who did not recall that Mr. Newell made any presentation regarding unions in the December orientation, corroborated Hr. Houtchens' denial, recalling that Mr. Houtchens responded to an employee question about unions that "there are no unions formed with the M resort at this time."[10]

C. Alleged Concerted Protected Activities and Management Response

During their employment, many of the Respondent's security officers including Mr. Allen, Mr. Skibickyj, Mr. DeVito, Mr. Medina, Mr. Shock, and Mr. Varner complained about working conditions, including lack of shelter and the Respondent's failure to provide needed equipment such as flashlights and jackets. In mid August, Ms. Soto told Mr. Allen, Mr. Skibickyj, and other security officers that the Respondent had terminated security officer Alex Carroll (Mr. Carroll) because he complained too much about working conditions on the jobsite. Mr. Allen, who knew Mr. Carroll had complained of lack of shelter, sun block, and flashlights and jobsite dust, told Ms. Soto that Mr. Carroll had valid complaints. Ms. Soto told Mr. Allen that he also complained too much.[11]

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[8] Ms. Ginden's testimony in this regard was in response to a leading question by the Respondent's counsel. However, Ms. Ginden impressed me as a reliable witness who could not be easily led, and I infer from her overall testimony that Mr. Houtchens' instructions to report union activity referred only to the activity of non-employees. I credit her account. Employee Manuel Silva, Jr. also testified. Although he recalled that Mr. Newell said the Respondent was a nonunion property, he otherwise denied that management made any statements about union activity at the October meetings.

[9] The Respondent first utilized the video at the December orientation. The Respondent introduced a 60-page hard copy of the PowerPoint presentation for the December orientation showing the content of each slide along with the slide script, as well as the video introduction script. The General Counsel does not contend the video presentation violated the Act.

[10] I do not find Mr. Cottingham's failure to recall Mr. Newell's admitted union presentation impacts his credibility, as it is not clear whether he attended the full orientation meeting. I found Mr. Cottingham to be a candid and reliable witness, and I credit his testimony. I give no weight to the testimony of employee Joe Dixon who denied that management ever mentioned the subject of unions in the December orientation/academy.

[11] In reaching this finding, I note that Ms. Soto agreed that security officers complained about such work-related matters as lack of water, shelter, flashlights, rain gear, patrol vehicles, and restroom supplies. Although she also testified that Mr. Carroll complained repeatedly about his shift and work place assignments, she did not deny that he participated in the general complaints. Ms. Soto said the Respondent terminated Mr. Carroll during his probationary period

Security officers Mr. Allen, Mr. Skibickyj, Mr. DeVito, Mike Tell, Jerry Herroya and Mr. Varner, discussed among themselves their perceptions that the Respondent accorded preferential treatment to female security officers.[12] Sometime in the beginning of September, Mr. Allen, accompanied by Mr. Skibickyj complained to Ms. Soto that the Respondent gave preferential treatment to certain female officers; Mr. Allen asked Ms. Soto why male officers had been terminated for rules infractions while the female officers' infractions had not resulted in termination.[13] During mid to late October, Mr. Allen and Mr. Skibickyj complained to Ms. Soto about the job performance of Maria St. Clair (Ms. St. Clair).[14] In late October/early November, Mr. DeVito also complained to Ms. Soto about preferential treatment given female officers.

On November 12, Mr. Skibickyj and Mr. Allen requested a meeting with management to address complaints about Ms. St. Clair. At the ensuing meeting, Mr. Allen and Mr. Skibickyj voiced their complaints about Ms. St. Clair's jobsite conduct in the presence of Ms. Soto, Mr. Perez, and Ms. St. Clair.[15]

D. Anonymous Complaints Regarding Employer Bias and Breach of Confidential Employee Information

On November 22, Mr. McCombs received an email message from someone identifying him/herself as "Trojan Fan."[16] The email expressed the author's desire to alert HR to the "deplorable state of the security department." The author complained of sex discrimination and bias against the majority of male employees, citing specific instances of assertedly unequal treatment and favoritism involving multiple unnamed security officers. The author concluded: "I'm well aware that [HR] exists to protect the company (not the individual) but in talking with outside agencies about filing a complaint, I was told to first bring it [to HR] attention…this is just so out of hand at this early stage, it has to be dealt with."

Mr. McCombs forwarded the email to Mr. Houtchens and by email dated December 1, responded to Trojan Fan: "I have received your comments and I can assure you we will take the

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because "basically [he] was not happy at all, and it made other officers uncomfortable[.]" Ms. Soto denied telling security employees that Mr. Carroll had been terminated because he complained too much and denied telling Mr. Allen he complained too much, saying she informed employees only that Mr. Carroll no longer worked for the Company. The reasonable inference to be drawn from Ms. Soto's admission that Mr. Carroll was terminated because his unhappiness with work discomfited other employees is that Mr. Carroll was, in fact, fired because he complained about work, which is consistent with Mr. Allen's testimony. I found Mr. Allen's testimony to be forthright and sincere, and I credit it.

[12] The preferential treatment complained of included failure to discipline female officers for such work infractions as leaving gates unsecured and playing card games on company time in the HR trailer.

[13] Ms. Soto denied that Mr. Allen had ever complained to her about preferential treatment of female security officers. I credit Mr. Allen's account.

[14] Mr. Allen shared complaints with employees Ms. Ginden, Danielle Malone, Mr. Skibickyj, and Mike Tell. Mr. Allen and Mr. Skibickyj, variously, complained that Ms. St. Clair was constantly late for work, took two-hour lunches, disappeared while on the jobsite, did not answer her radio, went into the contractors' trailers against company policy, made sexually explicit comments, and solicited for another company on the jobsite.

[15] The Respondent subsequently terminated Ms. St. Clair.

[16] As of the hearing, the identity of Trojan Fan remained unknown to Mr. McCombs.

appropriate action to make sure that each concern is appropriately considered and if necessary, proper action taken…I would encourage you to come forward…so that we can get more information and details about each of the complaints you have brought forward." Mr. McCombs directed Ms. Martinez to investigate Trojan Fan's complaints; as a result of the investigation a female security officer was terminated.[17]

By email dated December 7, Trojan Fan informed Mr. McCombs that serious violations of company procedure and privacy had occurred, including the illegal access of confidential employee information in HR. Mr. McCombs forwarded the email to Mr. Houtchens.

On December 8, Mr. Houtchens spoke privately with Mr. Allen, asking him what had been going on at the jobsite. Mr. Allen asked if Mr. Houtchens was talking about the personnel files found by security officers in the HR trailers. Mr. Houtchens asked Mr. Allen to explain, and Mr. Allen said he had heard that "someone on graveyard found an unsecured personnel file in the HR trailer."[18] Mr. Allen also told Mr. Houtchens that prior to the late-November termination of swing-shift security officer, Lisa Taylor (Ms. Taylor), Ms. Soto had provided security officer, Manuel Silva (Mr. Silva) with a work schedule that omitted the name of Ms. Taylor, which alerted fellow officers to her pending termination. At Mr. Houtchens' request, Mr. Allen agreed to talk to Mr. McCombs.

On December 10, Mr. McCombs, Mr. Perez, and Ms. Martinez met with Mr. Allen in the HR trailer (December 10 meeting). Mr. McCombs asked Mr. Allen if he thought he was being discriminated against. Mr. Allen said he did think so and enumerated his previously described complaints about disparate treatment.[19]

Mr. Allen told Mr. McCombs he had been contacted by two terminated male officers, one of whom had contacted the EEOC. Mr. Allen said the former employees had asked him if he would testify in their behalf if they brought a class action suit against the Respondent.[20] Mr. Perez said, "I want to know what their names are and what you talked about."

Mr. Allen declined to answer. Mr. Perez again asked for the names, and Mr. Allen again refused to supply them. Mr. Perez said, "I want to know whose side of the fence you are on. Are you on the company's side or are you on the terminated employees' side?"

Mr. Allen said, "I am not on anybody's side, but they were friends of mine, and in my opinion, they were unlawfully terminated, and there have been a lot of shady things going on the jobsite, and [if] they asked me to testify then I would." Mr. McCombs told Mr. Allen he had the right to meet with an EEOC investigator.

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[17] Details of the termination are not germane to the issues herein.

[18] Mr. Allen described to Mr. Houtchens a complicated inter-security-officer dialogue chain about the unsecured personnel file, which is unnecessary to detail here.

[19] Mr. McCombs testified that Mr. Allen denied being disparately treated. Not only was Mr. McCombs' testimony in this regard inconsistent with his testimony that Mr. Allen accused the Respondent of giving female officers favorable treatment, I was not impressed with his demeanor or his recall, the latter of which required extensive refreshing. Where it conflicts, I credit Mr. Allen's testimony over that of Mr. McCombs.

[20] Mr. Perez recalled that Mr. Allen said an EEOC investigator had requested an interview with him. It is unnecessary to resolve this minor inconsistency.

When discussion in the December 10 meeting turned to the issue of personnel files, Mr. Allen said there were rumors that security officers Mr. Shock, Mr. DeVito, and Mr. Varner were going through files on night shift. Mr. McCombs said he had gotten anonymous emails that alleged a breach of employee files. Mr. McCombs told Mr. Allen that he was to keep their discussion confidential.[21] Mr. Allen said, "This is stuff we have all been talking about on every shift for months now. Everybody already knows what is going on and what we are discussing here."

E. The Confidential File Investigation

Following the December 10 meeting, Mr. McCombs and Mr. Houtchens directed Mr. Perez to conduct an investigation into whether security officers had viewed confidential files in the Career Center (confidential file investigation).

In conducting the investigation, Mr. Perez interviewed employees on the night shift and received the following oral responses: On December 11, Mr. Medina said he did not know of security officers going through personnel files and that he had not done so; on December 13, Mr. Devito and Mr. Varner, respectively, likewise denied knowledge of security officers going through personnel files or personal culpability. Mr. Perez also interviewed Mr. Skibickyj, telling him not to discuss the investigation with others. On December 11, Mr. Perez and Mr. Houtchens interviewed Mr. Shock. Although Mr. Shock initially denied both knowledge of and guilt in breaching confidential files, after Mr. Houtchens encouraged him to tell the truth, Mr. Shock admitted that he and other officers had gone through personnel files in the human resources trailers, specifically Ms. Taylor's file.

Following oral interviews, Mr. Perez obtained written statements from the following security officers, inter alios, which in pertinent part contained the following information:

Russell Shock: "[A]round Thanksgiving…at the Career Center [I] opened and observed another fellow officer's file. Inside the file was Officer Taylor's photo [of her] sleeping. I was with Joe Varner. I am aware of a set of keys in the flower pot because another officer (Mike Devito) got them out. About 3 weeks ago myself, Roman [Medina], & Mike [DeVito] were in the career center and Roman [Medina] wanted to check the status of his wife's application…I noticed the file cabinet was open and Roman [Medina] and Mike [DeVito] were standing there."

Dean Skibickyj: Mr. Shock and Mr. Medina talked about seeing files of security personnel in the Human Resource Center.

Manuel "Manny" Silva: In early December, Mr. DeVito told Mr. Silva he had seen pictures of Ms. Taylor sleeping on the job. Mr. Silva denied seeing or hearing of any security officers going through any files.[22]

Helen M. Lindsey-Ginden: Mr. Medina told her that "they" saw a file at the HR trailer and found a photo of Ms. Taylor sleeping at work.

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[21] Mr. McCombs testified that the confidentiality request was limited to discussion of the breached files.

[22] Mr. Silva had earlier taken photos of Ms. Taylor sleeping on the job, which he turned over to his supervisor. At the hearing Mr. Silva testified that in the three weeks prior to December 12, Mr. DeVito said to him, "Come on Manny. I know you took the photos [of Ms. Taylor sleeping], and I know you saw her sleeping." Mr. Varner separately approached him during that same period and asked if he had taken photos of Ms. Taylor sleeping.

Enrique (Ricky) Stiegelmeyer: In early December, Mr. Varner told Mr. Stiegelmeyer that he had obtained a key for the HR file cabinets from a fake planter, which Mr. DeVito had shown him, and said that he and Mr. DeVito had looked through personnel files of future security officers. In Mr. Stiegelmeyer's presence, Mr. Varner used the key to open one of the HR file drawers, but Mr. Stiegelmeyer declined to look at the files.[23]

F. Discharges of Russell L. Shock, Jr., Michael DeVito, Joseph Varner, and Roman Medina

The Respondent terminated the following employees on the dates indicated with the following Personnel Action Notice (PAN) notation:

Mr. Shock	--	December 13	--	Introduction period
Mr. Medina	--	December 13	--	Introductory period
Mr. DeVito	--	December 13	--	Introduction period
Mr. Varner	--	December 13	--	Resignation

References in the PANs of Mr. Shock, Mr. Medina, and Mr. DeVito to introduction or introductory period indicated each employee had been terminated during his 90-day probation period. As to Mr. Varner, at the time of his termination he had already submitted a resignation notice to the Respondent setting a quit date later than December 13. The Respondent's termination of Mr. Varner prior to his proposed quit date constituted a termination of employment for the period between the December 13 termination date and his proposed quit date.[24] Although unstated in all four PANs, the underlying reason for each termination was the Respondent's determination that each of the four security officers had had a part in the breach of confidential or personnel files in the Career Center.

G. Mr. Allen and Mr. Skibickyj's Interaction with Mr. Murray

On the day of the December 10 meeting, as Mr. Allen and Mr. Skibickyj left work, they encountered Michael Murray (Mr. Murray), who worked as a security officer on the swing shift and with whom Mr. Allen had a cordial relationship. According to Mr. Allen, after exchanging greetings with Mr. Murray, Mr. Allen told him that Ms. Taylor was being terminated that day, explaining how the schedule omitting her name had been given to Mr. Silva and that all officers on the swing shift knew she was being terminated except Mr. Murray. Mr. Allen told Mr. Murray, "Mike, they are throwing you under the bus" ("under the bus" statement). Mr. Murray asked what Mr. Allen was talking about, and Mr. Allen told him of rumors that he and Ms. Taylor had "a thing going on." In describing this encounter, Mr. Skibickyj testified that Mr. Allen talked to Mr. Murray about a rumored relationship between Mr. Murray and Ms. Taylor. Mr. Skibickyj said Mr. Allen expressed perplexity that Mr. Murray's coworkers on the swing shift had not told him of the situation and speculated that the swing shift workers were "throwing him under the bus maybe."

Mr. Murray's testimony of the interaction differed significantly from that of Mr. Allen and Mr. Skibickyj. According to Mr. Murray's initial testimony, Mr. Allen and Mr. Skibickyj approached him and said, "We have something we want to tell you. It is confidential and needs

[23] Mr. Stiegelmeyer provided testimony at the hearing consistent with the statement given to Mr. Perez.

[24] Mr. Houtchens described the termination of Mr. Varner as an early acceptance of his resignation.

to stay between us…they are trying to throw you under the bus, Mike, with some kind of investigation." Mr. Murray said, "That's baloney. That's impossible, because I haven't done anything that would justify my being investigated." Mr. Allen and Mr. Skibickyj warned Mr. Murray to watch it. In later testimony, Mr. Murray acknowledged that Mr. Skibickyj was involved in the exchange only to the extent that he was standing next to Mr. Allen, "kind of nodding." Mr. Murray denied that either Mr. Allen or Mr. Skibickyj mentioned Ms. Taylor.

I have carefully considered the relative credibility of Mr. Allen, Mr. Skibickyj, and Mr. Murray, and I decline to give weight to Mr. Murray's testimony. I was unimpressed by his manner and demeanor, and I found his testimony overall to be vague, sometimes equivocal, and sometimes inherently incongruous, as noted hereafter. I give weight to Mr. Allen and Mr. Skibickyj's account of their December 10 contact with Mr. Murray.

H. The Allen/Skibickyj/Murray Investigation

Security officer Mr. Murray was neither a subject of nor a potential suspect in the confidential file investigation, and according to Mr. Perez, he did not interview Mr. Murray in connection with the investigation. Mr. Perez testified that while he was conducting the investigation on December 10, Ms. Soto asked him to contact Mr. Murray who was extremely upset about a conversation he had had with Mr. Allen and Mr. Skibickyj.[25] When Mr. Perez met with Mr. Murray, the employee told Mr. Perez that Mr. Allen and Mr. Skibickyj had approached him as he arrived at work that day and said there was a big investigation going on and that "they" were trying to "throw [me] under the bus." Mr. Murray asked if he needed to contact an attorney, saying, "I have never done anything. I come to work; I do my job. I stay out of other people's business, and I don't understand why I am being investigated." Mr. Perez told Mr. Murray that he was currently conducting an investigation but that Mr. Murray's name had never come up.

Mr. Murray's account of his meeting with Mr. Perez differs from that of Mr. Perez. According to Mr. Murray, Mr. Perez initiated the conversation with a question about personnel files, asking if Mr. Murray knew anything about a breach of confidential files. Mr. Perez then inquired about Mr. Murray's team leader, Mr. Kring, although Mr. Murray could not recall the exact nature of the question. Mr. Murray discussed with Mr. Perez the somewhat negative attitude Mr. Murray thought Mr. Kring had, his gruffness and sometimes insulting behavior. Mr. Murray's testimony of his discussion with Mr. Perez regarding his interaction with Mr. Allen and Mr. Skibickyj was abbreviated: the Respondent's counsel asked, "[D]id you convey the subject or substance of your conversation with Mr. Allen and Mr. Skibickyj [to Mr. Perez];" Mr. Murray answered, "Yes, I did" but did not further recount what he or Mr. Perez said in the meeting. When he left the meeting, Mr. Murray took a blank voluntary-statement form with him.

On December 11, Mr. Perez telephoned Mr. Murray, who was off work, and asked for a statement. On December 12, Mr. Murray faxed Mr. Perez a two-page hand-written statement, in which he addressed three matters: first, Mr. Murray referred to the confidential file investigation, stating that "regarding the incident in the career center trailers" he had noticed nothing out of the ordinary; second, Mr. Murray referred to interactions with Mr. Kring, stating that "regarding John Kring," he did his best to get along with him; third, Mr. Murray referred to his December 10 interaction with Mr. Allen and Mr. Skibickyj, stating:

[25] While Mr. Perez dates the ensuing interaction as December 11, based on the evidence as a whole, it appears that December 10 is the accurate date.

> Issue #3
> On Wednesday, Dec. 10 at 1450 hours as I was coming in to work, Bruce Allen and Dean Skibickyj stopped as they were leaving and said they had to tell me something, and that it had to "stay between us only." I said okay, what is it, and Bruce said, "They're trying to throw you under the bus, Mike with a big investigation." They gave me no specifics and did not say who "they" were. I was basically shocked, because I know that I have never done anything inappropriate or in violation of company policy while employed with the M Resort. Soon thereafter, I called [Ms. Soto] and expressed my concern and my need to follow up and find out what was going on. [Emphasis as written].[26]

Mr. Perez interviewed neither Mr. Allen nor Mr. Skibickyj regarding Mr. Murray's account of the December 10 interaction. On December 12, Mr. Perez provided Mr. McCombs and Mr. Houtchens with a written investigation summary followed by a more comprehensive investigation report along with written employee statements, including Mr. Murray's. In the summary and the report, Mr. Perez stated his conclusions that Mr. Shock, Mr. Varner, Mr. Medina, and Mr. Devito had engaged in unauthorized access of personnel files and had thereby violated the Respondent's security department's code of ethics. Mr. Perez' conclusions that Mr. Allen and Mr. Skibickyj's interaction with Mr. Murray had violated rules of conduct were identical: "Creating a hostile work environment [by] "advising Security Officer Mike Murray he was under investigation when the conversation between the investigator and him was supposed to be confidential." After reviewing the investigation report, Mr. Houtchens did not ask Mr. Allen or Mr. Skibickyj about their interaction with Mr. Murray. According to Mr. Houtchens, based on Mr. Perez' report, he believed Mr. Allen and Mr. Skibickyj had created a hostile work environment for Mr. Murray. Mr. Houtchens decided that both Mr. Allen and Mr. Skibickyj should be terminated because they had breached confidentiality during the interaction.

Upon reviewing Mr. Perez' investigation report, Mr. McCombs inferred from Mr. Murray's written statement that Mr. Allen had told Mr. Murray of the confidential file investigation. Although in past employee-confrontation situations, Mr. McCombs had talked to the parties involved in the interactions, Mr. McCombs did not speak to Mr. Allen or Mr. Skibickyj about the Allen/Murray exchange.[27] In Mr. McCombs' view, Mr. Allen's purpose or intent in making the "under the bus" comment to Mr. Murray was not relevant to his violation of confidentiality, which violation subjected him to discharge, and he also considered that how Mr. Murray received the comment was a "much lesser part" of the discharge equation. Mr. McCombs recommended Mr. Skibickyj's discharge because Mr. Skibickyj was present when Mr. Allen spoke to Mr. Murray but failed to disavow Mr. Allen's comment or to report to a supervisor a comment "that was clearly intended to harass that individual."

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[26] Mr. Murray and Mr. Perez' testimonies of their meeting are contradictory. Mr. Perez cites the Allen/Skibickyj/Murray encounter as the focal point of the meeting; Mr. Murray puts it in a nearly negligible third place. Given Mr. Murray's testimony, supported as it is by his written statement that also accords the encounter third place status, I cannot accept Mr. Perez' testimony. Moreover, the incongruity of Mr. Murray's account prevents me from fully crediting his testimony. If Mr. Murray were as upset by the Allen/Skibickyj/Murray encounter as he and Mr. Perez claim, the encounter should have been the primary focus not only of his and Mr. Perez' meeting but also of Mr. Murray's consequent written statement. The testimonial contradictions and the incongruity inherent in Mr. Murray's account prevent me from completely accepting either witness's testimony.

[27] Mr. McCombs cited two examples where he had talked to both parties to interchanges: a male bartender making unwelcome advances to a female bartender and a kitchen employee complaining that another employee repeatedly asked her out.

I. Discharges of Bruce Allen and Dean Skibickyj

1. Bruce Allen

On December 13, Mr. Perez directed Mr. Allen to go to Mr. McCombs' office, where Mr. Allen met Mr. McCombs and Mr. Houtchens. Mr. Houtchens told Mr. Allen his employment was terminated. When Mr. Allen asked why, Mr. McCombs replied, "For improper job conduct," saying that Mr. Allen had disclosed things discussed in the December 10 meeting. Mr. Allen protested that he had engaged in no improper conduct, and Mr. McCombs said, "Nonetheless, we are going to continue your termination…that's it." Mr. McCombs provided Mr. Allen with a completed PAN, on which Reason for Termination was explained as "Improper Job Conduct."[28] No one in management talked to Mr. Allen about his interaction with Mr. Murray before the Respondent terminated him.

2. Dean Skibickyj

While employed by the Respondent as a security officer, Mr. Skibickyj, along with Mr. Allen, complained to Ms. Soto about perceived disparate treatment of security officers. Mr. Houtchens observed that Mr. Skibickyj and Mr. Allen often conversed together. On December 13, Mr. Perez directed Mr. Skibickyj to Mr. McCombs' office where Mr. McCombs and Mr. Houtchens were present. Mr. McCombs told Mr. Skibickyj his employment was terminated because he did not fit the "M" standard. Mr. McCombs provided Mr. Skibickyj with a completed PAN on which the reason for termination was noted as "Improper Job Conduct."[29]

Regarding the Respondent's reasons for firing Mr. Skibickyj, Mr. Houtchens gave a number of explanations. Mr. Houtchens initially testified that he based his decision to discharge Mr. Skibickyj on the fact that Mr. Skibickyj told Mr. Murray, "'there is an investigation' or words to that effect." After reviewing Mr. Murray's statement, Mr. Houtchens agreed the statement identified Mr. Allen as the employee who told Mr. Murray an investigation was going on. Mr. Houtchens also agreed that to his knowledge Mr. Skibickyj had "no clue" an investigation was going on and did not therefore breach confidentiality. Mr. Houtchens also initially testified that Mr. Skibickyj had created a hostile work environment by talking to Mr. Murray about a confidential investigation. Upon being pressed by Counsel for the General Counsel, who pointed out the investigation showed no interaction between Mr. Skibickyj and Mr. Murray, Mr. Houtchens said that Mr. Skibickyj was remiss in not reporting Mr. Allen's statements to management. Mr. Houtchens further initially testified that approximately three employees had stated that "[Mr. Allen] and [Mr. Skibickyj] are always trying to pit the shifts against each other." After reviewing employee investigatory statements, Mr. Houtchens acknowledged he was mistaken in that conclusion as well. Finally, Mr. Houtchens testified he was prompted to terminate Mr. Skibickyj by two considerations: (1) Mr. Skibickyj violated the company code of ethics for not reporting Mr. Allen's interaction with Mr. Murray. Mr. Houtchens considered that Mr. Skibickyj failed in his obligation to report Mr. Allen's "harassment" of Mr. Murray to a

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[28] At the hearing, Mr. McCombs explained more fully that the improper job conduct noted in Mr. Allen's PAN was that Mr. Allen had violated the Respondent's directive to him that he keep confidential his knowledge of the company's investigation into alleged misconduct within the career center. Specifically, the Respondent believed Mr. Allen had told Mr. Murray he was a subject of the Respondent's investigation into the unauthorized access of personnel files.

[29] At the hearing, Mr. McCombs explained that the improper job conduct noted in Mr. Skibickyj's PAN was Mr. Skibickyj's presence when Mr. Allen told Mr. Murray he was being thrown under a bus.

supervisor or failed to report Mr. Allen's use of the word "investigation" in speaking to Mr. Murray, which misconduct merited discharge.[30] (2) Mr. Skibickyj violated Nevada law by driving a company vehicle without a license.[31] No one in management talked to Mr. Skibickyj about his interaction with Mr. Murray before the Respondent terminated him.

V. DISCUSSION

A. Legal Principles

Section 7 of the National Labor Relations Act provides that employees have the right to engage in union activities and, in pertinent part, "the right to … engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection …." The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

To enjoy Section 7 safeguards, employee activity must be both "concerted" and "protected," which a propounding party may prove by showing the activity (1) involves a work-related complaint or grievance; (2) furthers some group interest; (3) seeks a specific remedy or result; and (4) is not unlawful or otherwise improper. *NLRB v. Robertson Industries*, 560 F.2d 396, 398 (9th Cir. 1976), cited with approval by the Board in *Northeast Beverage Corporation,* 349 NLRB 1166 fn. 9 (2007). To be concerted, employee activity must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 NLRB 493, 497 (1984). Concerted activity includes individual activity that seeks to initiate or to induce or to prepare for group action, as well as individual employees bringing group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882 (1986). Employees do not have to accept the individual's call for group action before the invitation itself is considered concerted. *Cibao Meat Products,* 338 NLRB 934 (2003); *Whittaker Corp*., 289 NLRB 933, 934 (1988); *El Gran Combo*, 284 NLRB 1115 (1987). "[C]oncertedness…can be established even though the individual [speaking] was not 'specifically authorized'…to act as a group spokesperson for group complaints." *Herbert F. Darling, Inc.,* 287 NLRB 1356, 1360 (1988). Concerted activity includes concerns that are a "logical outgrowth" of group concerns. *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Compuware Corporation,* 320 NLRB 101 (1995). Work-related complaints or grievances include complaints regarding terms and conditions of employment, *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), as well as concerted complaints to governmental agencies. *Delta Health Center, Inc.,* 310 NLRB 26 (1993).

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[30] Mr. Houtchens analogized the situation to one security officer watching another officer steal a fellow officer's wallet but saying nothing about it, testifying, "Okay, now, when somebody says investigation, why would you say investigation first of all? You know, I mean, I have got no clue why he would use the word 'investigation.' But that confidentiality there, and that not reporting—I mean, it was something that was confidential, and whether or not [Mr. Skibickyj] knew there was an investigation going on, he [stood] there and allowed [Mr. Allen] to go on and do that."

[31] In its post-hearing brief the Respondent mentioned in two separate footnotes that Mr. Skibickyj's unlicensed driving was a basis for termination, but did not otherwise discuss that issue. Inasmuch as no supervisor mentioned unlicensed driving to Mr. Skibickyj as a cause for his termination, I conclude the Respondent did not consider that charge to be a significant factor in Mr. Skibickyj's discharge, and I give no weight to Mr. Houtchens' assertion that it was.

In cases turning on employer motivation, the Board applies an analytical framework that assigns the General Counsel the initial burden of showing protected concerted activity was a motivating or substantial factor in an adverse employment action. The elements commonly required to support such a showing are protected activity by the employee, employer knowledge of that activity, and animus on the part of the employer. The burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *Alton H. Piester, LLC,* 353 NLRB No. 33 (2008).

B. Alleged Unlawful Statements: the 2008 Orientation/Academy Meetings

The complaint alleges that the Respondent unlawfully applied the Respondent's union-position provisions of its employee handbook to limit and restrict the rights of its employees to engage in union and other concerted activities. Specifically, the complaint alleges that the Respondent violated the Act by displaying a "no union" symbol at employee orientation sessions, by threatening employees with unspecified reprisals if they supported a union, by informing employees it would be futile for them to select a union as their bargaining representative, by prohibiting employees from engaging in union activities at the Respondent's facility and threatening them with discharge if they did so, and by requiring security guards to engage in the surveillance of the union activities of other employees at the Respondent's facility and to report such to management. The General Counsel does not, apparently, contend that the Respondent's position on unions set forth in its employee handbook or its presentation of the No Union slide independently violated the Act. Rather, the General Counsel argues that both the handbook provisions and the No Union slide are coercive when coupled with statements made by supervisors and agents of the Respondent at the orientation/academy meetings.

In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump and Plumbing*, 334 NLRB 824 (2001). Communications from an employer to employees that threaten reprisal for supporting a labor organization, suggest the futility of choosing union representation, or create an impression that its employees' protected union activities are monitored interfere with, restrain, or coerce employees as contemplated by Section 8(a)(1). *Empire State Weeklies, Inc.,* 354 NLRB No. 91, at slip op. 3 (2009); *Regal Health and Rehab Center, Inc.,* 354 NLRB No. 51, at slip op. 1 (2009); *Grouse Mountain Lodge,* 333 NLRB 1322 fn. 2 (2001); *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999).

The General Counsel has the burden of proving that the Respondent's supervisors/agents made specific statements in the course of the orientation/academy meetings that tended to interfere with employees' free exercise of their rights. None of the employee witnesses presented by either the General Counsel or the Respondent was able to provide comprehensive testimony of what occurred at the meetings. Rather, most testified to fragments of what was allegedly said without adequate context, and no witness directly corroborated another. In those circumstances, it is difficult to determine whether the testimonies provided by the General Counsel's witnesses are recollections of what was said or whether the testimonies reflect inferences perhaps unwarrantedly drawn.

As noted above, I have accepted Mr. Newell's account of the Respondent's orientation presentations, and I have found that employee witnesses Mr. Kring, Ms. Ginden, and Mr. Cottingham provided credible evidence of some of what was said at the

orientation/academy meetings. Their collective testimony does not support the General Counsel's evidence. Moreover, I find it implausible that the Respondent's supervisors would flagrantly subvert the Respondent's carefully crafted, legal position on employee unionization by openly threatening employees in general employee meetings with reprisals, union organizational futility, and discharge, and by soliciting surveillance of coworkers. Accordingly, I find the General Counsel did not meet his burden of proving the complaint allegations that Respondent made unlawful statements at its orientation/academy meetings. I shall, therefore, dismiss those allegations of the complaint.

C. Concerted Protected Activities and Unlawful Statements

Practically as soon as the Respondent's employed its own security force, a number of the Respondent's security officers complained to each other and to management about working conditions on the jobsite, including lack of shelter and equipment deficiencies. Male security officers also discussed with each other their perceptions that the Respondent accorded preferential employment treatment to female security officers. Employee discussion of and complaints about working conditions, including complaints of preferential treatment in the workplace, are protected concerted activities entitled to the protection of Section 7 of the Act,[32] and the Respondent does not contend otherwise.

In mid August, Ms. Soto told security officers that the Respondent had terminated security officer Mr. Carroll because he complained too much about working conditions and observed to Mr. Allen that he, too, complained too much. The complaint alleges that Ms. Soto's statements in this regard constitute a threat of discharge. The Board's standard for analyzing an alleged threat is whether the statement "would tend to coerce a reasonable employee,"[33] and the Board considers the "totality of the relevant circumstances."[34] Applying that standard here, I find that reasonable employees would likely construe Ms. Soto's statement as threatening discharge or other serious, negative consequences if they continued complaining about working conditions. Accordingly, I find that Ms. Soto violated Section 8(a)(1) of the Act by these mid-August communications to employees.

Notwithstanding Ms. Soto's threat, Mr. Allen and Mr. Skibickyj continued to complain, protesting to Ms. Soto in September against the perceived preferential treatment of female officers and in October complaining about a female officer's job performance. On November 12, Mr. Allen and Mr. Skibickyj met with Ms. Soto and Mr. Perez to complain about a female officer's jobsite conduct.

In the course of investigating the November anonymous email allegations of employer discrimination and bias and breach of confidential employee information, Mr. McCombs, Mr. Perez, and Ms. Martinez held the December 10 meeting with Mr. Allen. During that meeting, Mr. Allen said he thought he was being discriminated against and acknowledged that he had had communication with two former employees, one of whom had contacted the EEOC. Admitted supervisor, Mr. Perez, asked Mr. Allen to provide the two officers' names and the substance of his conversation with them. When Mr. Allen declined to do so, Mr. Perez demanded to know which side of the fence Mr. Allen was on, saying, "Are you on the company's side or are you on the terminated employees' side?" The complaint alleges that on or about December 10 Mr. McCombs interrogated employees about their concerted activities and the concerted activities of other employees. There is no complaint allegation regarding Mr. Perez.

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[32] *Rock Valley Trucking Co., Inc.,* 350 NLRB 69, 69 (2007).

[33] *Madison Industries*, 290 NLRB 1226, 1229 (1988).

[34] *Ebenezer Rail Car Services*, 333 NLRB 167, 167 fn. 2 (2001).

In his post-hearing brief, Counsel for the General Counsel apparently takes the position that Mr. Perez' questioning of Mr. Allen in the December 10 meeting fits within the parameters of this complaint allegation. The Respondent presumably concurs in the General Counsel's position, as its post-hearing brief thoroughly addresses the issue of whether Mr. McCombs and Mr. Perez "impermissibly asked questions of Allen when [Mr. Allen] brought up the fact that he had been contacted to provide a statement regarding two former employees' EEOC charges."[35]

The Respondent argues that Mr. McCombs and Mr. Perez lawfully questioned Mr. Allen about potential litigation against the Respondent after he voluntarily and unilaterally initiated the topic of potential EEOC charges.[36] The Board's test for evaluating the legality of an employer's interrogations of its employees concerning their protected concerted activities is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, and interfere with rights guaranteed by the Act." *Rossmore House,* 269 NLRB 1176, 1177-1178 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Relevant factors that may be considered in the *Rossmore House* test include (1) the background (the surrounding circumstances including unlawful threats and acts of discrimination); (2) the nature of information sought; (3) the identity of the questioner; (4) and the place and method of interrogation. *Id; Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 959 (2004); *TKC, A Joint Venture*, 340 NLRB 923, fn. 2 (2003).

Applying the Board's *Rossmore* test to Mr. Perez' December 10 interrogation of Mr. Allen, I find that his questions tended to restrain, coerce, and interfere with Mr. Allen's Section 7 rights. The December 10 meeting took place in the presence of three management officials whose combined authority might reasonably be expected to intimidate an employee.[37] Although Ms. Soto was not present in the December 10 meeting, she had previously signified the Respondent's displeasure with complainers and at least implied that complaining could result in discharge. In that background, Mr. Perez sought details of Mr. Allen's interaction with potential litigators, which inquiries might reasonably be expected to extend to the sympathies of current employees.[38] The Board has traditionally found questions designed to discover employees' protected sympathies and activities and those of their fellow employees to be coercive and unlawful. See *Atlantic Veal & Lamb, Inc.*, supra. Finally, Mr. Perez' question as to

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[35] It is reasonable to infer that the complaint allegation encompasses the conduct of all managerial participants in the December 10 meeting. Since neither Mr. McCombs nor Ms. Martinez objected to Mr. Perez' questions, they might justifiably be said to have assented to them. Although Mr. McCombs told Mr. Allen he had the right to meet with an EEOC investigator, none of the three supervisors present assured Mr. Allen that the Respondent would not view his doing so as taking sides. In light of the supervisors' concurrent conduct in the December 10 meeting and the parties' mutual discussion of the interrogation issue in their briefs, I find it unnecessary to consider the due process implications of the complaint's failure specifically to name Mr. Perez as engaging in unlawful interrogation on December 10. In all events, Mr. Perez' questions may be appropriately considered in establishing animus.

[36] The Respondent also apparently argues that questioning about EEOC litigation is not unlawful as EEOC charges are not concerted but "individual in nature." However, Mr. Perez' questioning related primarily to Mr. Allen's support of a potential charge of employer bias against male employees, a clearly concerted action. See *Publix Super Markets, Inc.,* 347 NLRB 1434-35 (2006).

[37] The fact that Mr. Allen did not appear to be intimidated is irrelevant, as the standard is an objective one.

[38] Although Mr. Allen's asserted contacts had been with former employees, it is reasonable to infer that further interrogation along those lines could divulge the identity of current employees who were sympathetic to bias litigation.

whether Mr. Allen was on the employer's or the terminated employees' side implies a hostility to the protected activity of concertedly pursuing or supporting a lawsuit concerning working conditions.[39] In these circumstances, I find that Mr. Perez' December 10 questioning of Mr. Allen, undeterred and unqualified by Mr. McCombs or Ms. Martinez as it was, violated Section 8(a)(1) of the Act.

D. Discharges of Russell L. Shock, Jr., Roman Medina, Michael DeVito, and Joseph Varner

After receiving an anonymous email alleging that confidential employee information had been illegally accessed in the Human Resource offices, the Respondent commenced an investigation. The Respondent interviewed Mr. Shock, Mr. Medina, Mr. DeVito, and Mr. Varner, as well as other employees regarding improper employee access to files. Mr. Medina, Mr. DeVito, and Mr. Varner denied complicity in any improper access of employee files, but Mr. Shock admitted viewing another security officer's personnel file and implicated the other three in facilitating and/or engaging in similar conduct. Following the investigation, the Respondent discharged the four employees.

Counsel for the General Counsel does not apparently dispute the findings of the Respondent's confidential file investigation but argues in his post-hearing brief that the company took advantage of the personnel files issue to rid itself of troublemakers and complainers, choosing to silence them by discharge rather than warning them for their conduct. Inasmuch as the General Counsel has questioned the Respondent's motive in imposing discharge upon the four employees rather than a lesser disciplinary penalty, a *Wright Line* analysis of the discharges is appropriate.

The evidence shows that prior to their discharges, Mr. Shock, Mr. Medina, Mr. DeVito, and Mr. Varner engaged in the concerted protected activity of complaining about working conditions and that supervisors of the Respondent knew it. There is also evidence of general employer animus toward security officers' protected complaints. The General Counsel having proved the elements commonly required under *Wright Line* to support a showing that protected concerted activity was a motivating or substantial factor in the four employees' discharges, the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employees' protected activity.

While the disciplinary penalties imposed on Mr. Shock, Mr. Medina, Mr. DeVito, and Mr. Varner were admittedly harsh, it is not the role of the administrative law judge to second guess an employer's degree of punishment. There is no question that an employer could reasonably view breaches of confidential employee files as critical infractions of company rules, and there is no disciplinary history to show that termination of employment in such circumstances was an extreme measure for the Respondent. Therefore, I find the Respondent has met its shifted burden and has established that it would have taken the same action against Mr. Shock, Mr. Medina, Mr. DeVito, and Mr. Varner even in the absence of their protected activity. Accordingly, I shall dismiss those allegations of the complaint relating to the discharges of Mr. Shock, Mr. Medina, Mr. DeVito, and Mr. Varner.

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[39] While equating protected activity with disloyalty may violate Section 8(a)(1) of the Act (see *Sawgrass Auto Mall,* 353 NLRB No. 40 fn. 14 (2008)), the General Counsel has not presented any such theory of violation for my consideration.

E. Discharges of Bruce Allen and Dean Skibickyj

Before Mr. Allen met with Mr. McCombs, Mr. Perez, and Ms. Martinez in the December 10 meeting, he and Mr. Skibickyj were well known to management as employees who complained of working conditions. The two complainers were apparently linked at least in Mr. Houtchens' mind, as he noted that Mr. Skibickyj and Mr. Allen often conversed together. In August, Ms. Soto told security officers that a fellow officer had been terminated because he complained too much about working conditions and told Mr. Allen that he also complained too much. In September, both Mr. Allen and Mr. Skibickyj complained to Ms. Soto about the Respondent's preferential treatment of female employees. In October they complained to Ms. Soto about the job performance of another security officer that impacted their work load. All such complaints were concerted and protected.

At the December 10 meeting, consistent with his complaints of the previous months, Mr. Allen told Mr. McCombs, Mr. Perez, and Ms. Martinez that he believed the Respondent was discriminating against him, that he believed certain security officers had been wrongfully terminated, and that he intended to testify for them in future litigation if asked. As explicated earlier, Mr. Perez expressed the Respondent's disapprobation with Mr. Allen's stance by his unlawful interrogation—particularly his demand that Mr. Allen advise the group which side of the potential litigation he elected to support: "Are you on the company's side or are you on the terminated employees' side?" It is probable that management thought Mr. Allen's refusal to answer Mr. Perez' unlawful questions was, at the least, uncooperative, and it is reasonable to assume that when Mr. Allen protested Mr. McCombs' injunction against talking about the December 10 discussion, he was further distinguished as an intransigent complainer.

Later on the day of the December 10 meeting, Mr. Allen in the company of Mr. Skibickyj, told Mr. Murray that all officers on Mr. Murray's swing shift except Mr. Murray knew that a fellow officer, Ms. Taylor, was being terminated and that "they" were throwing him under the bus because of a rumored relationship between him and Ms. Taylor. Mr. Murray reported his conversation with Mr. Allen to Ms. Soto and then to Mr. Perez and provided Mr. Perez with a written statement describing it. Based on Mr. Murray's statement, without further enquiry, the Respondent fired Mr. Allen and Mr. Skibickyj.

Counsel for the General Counsel contends that the Respondent discharged Mr. Allen and Mr. Skibickyj for complaining about working conditions with the added motive, in Mr. Allen's case, of rancor toward his having made common cause with litigation-minded former employees. The Respondent argues that it lawfully fired Mr. Allen and Mr. Skibickyj because it held an honest belief that the two employees had engaged in misconduct by directly contravening Mr. Perez and Mr. McCombs' order not to discuss the confidential file investigation with others—Mr. Allen by telling Mr. Murray he was being "thrown under the bus" and Mr. Skibickyj by nodding his agreement and by failing to report the breach of confidentiality to management.[40]

[40] Although both Mr. Houtchens and Mr. McCombs mentioned creation of a hostile work environment or harassment of Mr. Murray as bases for the discharges of Mr. Allen and Mr. Skibickyj, it is clear from the credible testimony as a whole that breach of confidentiality was the Respondent's definitive, asserted motivation, and only that basis is addressed herein.

The General Counsel and the Respondent's positions put the question of the Respondent's motive squarely at issue, necessitating a *Wright Line* analysis of the discharges.[41] The evidence shows that both Mr. Allen and Mr. Skibickyj were in the forefront of protected employee complaints about working conditions, taking their grievances directly to Ms. Soto in September and October and initiating a complaint meeting in November with Ms. Soto and Mr. Perez. On December 8, Mr. Allen communicated additional complaints to Mr. Houtchens, and at the December 10 meeting, Mr. Allen made clear his support for potential discrimination litigation against the Respondent.[42] Employer animus toward Mr. Allen's protected complaints is evidenced by Ms. Soto's August statement to Mr. Allen that he, like Mr. Carroll who was fired for complaining, was a complainer and by Mr. Perez' December 10 demand that Mr. Allen declare allegiance to either the Respondent or to potential EEOC plaintiffs. The General Counsel having proved the elements commonly required under *Wright Line* to support a showing that protected concerted activity was a motivating or substantial factor in the four employees' discharges, the burden shifts to the employer to prove that it would have taken the same action even in the absence of the employees' protected activity.

I find the Respondent has not met its shifted burden. In assessing the reasonableness of the Respondent's asserted belief that Mr. Allen and Mr. Skibickyj engaged in misconduct that deserved termination, I have considered the following: (1) Mr. Murray's statement upon which the Respondent relied was cursory at best, and the statement Mr. Murray attributed to Mr. Allen was at least ambivalent. Even a superficial reading of the statement should have prompted questions designed to elicit a fuller and contextual description of what had occurred before the Respondent concluded that Mr. Allen was referring to the confidential file investigation when he spoke to Mr. Murray; yet neither Mr. Perez nor Mr. Houtchens questioned Mr. Murray any further. (2) No one from management interviewed Mr. Allen or Mr. Skibickyj or sought, in any other way, to get their version of their encounter with Mr. Murray before discharging them, although what little evidence exists of the Respondent's interview practice suggests that generally all employee participants in employee-confrontation cases are questioned. Moreover, the fact that Mr. Murray was never an employee-of-interest in the confidential file investigation should have suggested to management that there might be an innocent explanation for the "under the bus" statement; yet no member of management asked Mr. Allen or Mr. Skibickyj for any explanation. (3) In testifying, Mr. Houtchens' gave inaccurate and shifting explanations of the Respondent's discharge grounds for Mr. Skibickyj.

I find that the Respondent's failure to conduct an adequate investigation of Mr. Murray's accusation against Mr. Allen and Mr. Skibickyj evidences discriminatory motivation. See *Alstyle Apparel*, 351 NLRB 1287, 1287-1288 (2007) (limited investigation into alleged misconduct without giving employees an opportunity to explain allegations against them supports a conclusion that discharges were discriminatorily motivated); *Midnight Rose Hotel*, 343 NLRB 1003,1005 (2004) (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct). I further find that Mr. Houtchens' lack of credibility in articulating the basis for Mr. Skibickyj's termination also evidences an absence of reasonable

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[41] Since the General Counsel does not assert that either Mr. Allen or Mr. Skibickyj had a protected right to discuss the Respondent's investigation with other employees, it is unnecessary to consider whether the precepts enunciated by *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) apply.

[42] Although Mr. Skibickyj was not present when Mr. Allen complained to Mr. Houtchens on December 8 and did not participate in the December 10 meeting, his general agreement with Mr. Allen's concerns had earlier been evidenced by his joining with Mr. Allen in the September, October, and November complaints to management, and Mr. Houtchens had noted that Mr. Skibickyj and Mr. Allen often conversed together.

belief and an improper motive that redound to both discharges. Inferences of animus and discriminatory motive may derive from false reasons given in defense, *Trump Marina Hotel Casino,* 353 NLRB No. 93, slip op 11 (2009) (citations omitted); I draw just such inferences from Mr. Houtchens' shifting explanations. In sum, I find the Respondent held no good faith belief that Mr. Allen and/or Mr. Skibickyj had engaged in misconduct when Mr. Houtchens fired them. As a consequence, the Respondent has not met its shifted burden under *Wright Line.* The evidence supports the conclusion that the Respondent's true motivation in discharging Mr. Allen and Mr. Skibickyj was not their alleged misconduct but rather their protected activities.[43] Accordingly, I find the Respondent violated Section 8(a)(1) of the Act by discharging Mr. Allen and Mr. Skibickyj on December 13.

VI. CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge for engaging in concerted protected activities.
3. The Respondent violated Section 8(a)(1) of the Act by interrogating employees about their concerted protected activities and the concerted protected activities of other employees.
4. The Respondent violated Section 8(a)(1) of the Act by discharging Bruce Allen and Dean Skibickyj because they engaged in concerted protected activities.
5. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(1) and Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully discharged Bruce Allen and Dean Skibickyj, it must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the dates of his discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[44] The Respondent will be ordered to make appropriate emendations to Bruce Allen and Dean Skibickyj's personnel files and to inform them in writing that it has done so. The Respondent will be ordered to post an appropriate notice.

[43] Even assuming that the Respondent was principally motivated to retaliate against Mr. Allen and that Mr. Skibickyj was an unfortunate casualty of that unlawful motivation, Mr. Skibickyj's discharge, consequent as it was to the Respondent's animosity toward Mr. Allen, is also unlawful.

[44] The General Counsel seeks compound interest computed on a quarterly basis for any backpay awarded. However, the Board has shown no inclination to deviate from its current practice of assessing simple interest. See National Fabco Manufacturing, Inc., 352 NLRB No. 37 (2008); *Rogers Corp.*, 344 NLRB 504 (2005).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[45]

ORDER

Respondent, The M Resort LLC d/b/a M Resort Spa Casino, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge for engaging in concerted protected activities.
(b) Interrogating employees about their concerted protected activities and the concerted protected activities of other employees.
(c) Discharging any employee for engaging in protected concerted activities.
(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Bruce Allen and Dean Skibickyj full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to seniority or any other rights or privileges previously enjoyed.
(b) Make Bruce Allen and Dean Skibickyj whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Bruce Allen and Dean Skibickyj and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.
(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
(e) Within 14 days after service by the Region, post at its facilities in Henderson, Nevada copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or

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[45] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

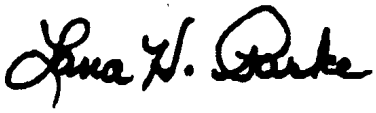
[46] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: November 5, 2009



Lana H. Parke
Administrative Law Judge

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. More particularly,
WE WILL NOT threaten employees with discharge for complaining about working conditions or for engaging in other concerted protected activities.
WE WILL NOT Interrogate employees about their concerted protected activities and the concerted protected activities of other employees.
WE WILL NOT discharge employees because they engage in the concerted protected activity of complaining about working conditions.
WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights stated above.

WE WILL offer Bruce Allen and Dean Skibickyj full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to seniority or to any other rights or privileges previously enjoyed.
WE WILL make Bruce Allen and Dean Skibickyj whole for any loss of earnings and other benefits suffered as a result of our unlawful discharge of them.

WE WILL remove from our files any reference to the unlawful discharges of Bruce Allen and Dean Skibickyj and notify them in writing that this has been done and that the discharges will not be used against them in any way.

THE M RESORT, LLC d/b/a
M RESORT SPA CASINO
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099
Hours: 8:15 a.m. to 4:45 p.m.
602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.